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No. 98-313

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SONNY GIBSON,
Petitioner,

vs.

GERALDO RIVERA, TRIBUNE COMPANY,
THE INVESTIGATIVE NEWS GROUP, INC.,
ASAP/GOODNIGHT AMERICA, INC., MARTIN BERMAN,
PENNY PRICE, CBS TELEVISION, INC. and
KCBS-TV LOS ANGELES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

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I.
INTRODUCTION

Respondents do not address the serious constitutional claims raised in the Petition. Instead, Respondents attempt to insulate the Court of Appeal's erroneous federal constitutional rulings from review in this Court by claiming, despite the obvious federal basis for the lower court's rulings, that the decision below was based entirely on state law grounds.

Respondents do not address the clear conflict in the Circuits concerning the First Amendment limitations on tort claims based on the manner in which "news" is gathered or disseminated, as opposed to the substance of the "news." *Compare Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) *with Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995). *See also Food Lion v. Capital Cities/ABC, Inc.*, 887 F.Supp. 811 (M.D.N.C. 1995).

This conflict exists in this increasingly contentious area of media law and this case squarely presents the issue of the First Amendment limits on the kind of "ambush" technique employed by the Geraldo Rivera Show and other entertainment shows of its ilk.

Respondents' only response to Petitioner's news gathering tort claim is to argue that review in this Court is improper because Petitioner provided no evidence of damages. However, the Court of Appeal's discussion on the damages issue flows directly and inextricably from its faulty First Amendment analysis challenged in this Petition. Absent the federal constitutional decision made by the Court of Appeal, Petitioner would have been entitled to his

day in court under established California law. *See* §II, *infra*.

Similarly, Respondents attempt to direct this Court's attention from the Court of Appeal's profound misreading of *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), by claiming that Petitioner never alleged negligence and so could not pursue a private figure defamation claim after the Court of Appeal correctly overturned the trial court's finding that Petitioner was a public figure.

However, the issue in this Court is not whether Petitioner had to plead negligence; the issue is whether the Court of Appeal imposed a burden of proving constitutional malice on Petitioner because of a misreading of this Court's decision in *Hepps*. Indeed, Respondents' opposition demonstrates how completely the Court of Appeal's analysis depended on what it, erroneously, believed was required by this Court's decision in *Hepps*. The reason Petitioner lost was that he was found not to have provided evidence of constitutional malice under this Court's decisions. Thus, whether Petitioner pleaded negligence or intentional misconduct, the crucial point is that Petitioner should not have been required, as a private figure, to plead and prove constitutional malice. Without this burden, Petitioner would have been entitled to have a jury decide his claims.

The confusion in the Court of Appeal's opinion is based on a misreading of this Court's decisions regarding private figure defamation cases against the media. This Court should review this case to make it clear that the First Amendment does not displace California defamation law in

private figure cases, at least with respect to claims for compensatory or general damages.

II.
PETITIONER'S PROOF OF DAMAGES WAS MORE THAN SUFFICIENT TO SATISFY CALIFORNIA LAW IN THE ABSENCE OF THE COURT OF APPEAL'S MISINTERPRETATION OF THE CONSTITUTION

In *Dietemann* damages were found allowable for surreptitious taping of true facts tending to put the plaintiff in a bad light because of the media defendants' "calculated misdeed" in lying to gain entry. Such damages were distinct from any damages for the broadcast of defamatory statements. Here, Petitioner made the same type of claim and introduced substantial evidence that he had been harmed by defendants' fraudulent activities.

This evidence of Petitioner's damages may be summarized as follows: Petitioner received a telephone call from Respondent Price, who claimed to be a producer of "The Geraldo Show." Price represented to Petitioner that the topic of an upcoming Geraldo Show was "Women Who Married Men in the Mafia." In fact, the producers of the show planned to ambush Gibson by confronting him with two women who said that he had sexually harassed them during casting sessions. Petitioner, not knowing this, conditioned his appearance on the show upon the show's announcing that he had completely reformed and left behind his life of crime and to highlight his work as a motion picture actor and his volunteer work to educate youngsters on the dangers of drug use. Petitioner arranged to send

notices that he would be appearing on the show to hundreds of casting directors in the area. When the show aired, he was severely humiliated because he had notified influential people to watch the show that turned out to be an ambush. Persons saw the show that were unlikely to see it otherwise. After the broadcast and re-broadcast of the show, Petitioner received notice that film projects had been canceled as a result of his appearance on the show. Basically, after the ambush show, he did not work as an actor.

There is no doubt that such damages are ordinarily allowable for these state law claims under established California law. California Civil Code §§ 1709 and 3333; *Gagne v. Bertran*, 43 Cal.2d 481, 490, 275 P.2d 15, 21-22 (1954).

Ignoring these traditional principles, the Court of Appeal was seduced by Respondents' simplistic but erroneous assertion that "Gibson's mere appearance on the show -- no matter how he arrived there -- caused him no damage." Pet. App. 14a. This, of course, was not an empirical observation, in light of the ample evidence of damages described above. Nor was it an accurate statement of California law.

This erroneous statement flowed from the Court of Appeal's rejection on First Amendment grounds of Petitioner's basic theory of the case which derives directly from the *Dietemann* side of the split in authority Petitioner asks this Court to resolve in this case.

III.
THE PLEADING ISSUE RESPONDENT RAISES FLOWS DIRECTLY FROM THE COURT OF APPEAL'S CONSTITUTIONAL ERROR

The reason Petitioner had summary judgment entered against him was the Court of Appeal's misunderstanding of *Philadelphia v. Hepps*, 475 U.S. 767 (1986), not any technical pleading issue under state law. The Court of Appeal properly found Petitioner to be a private figure. Pet. App. 7a-8a. However, it then misunderstood this Court's decision in *Hepps* to require Petitioner to prove constitutional malice with convincing clarity in order to prevail on any aspect of his defamation claim, even his claims for general damages under California Civil Code §48a, simply because he was making a claim for punitive damages against a media defendant. Pet. App. 9a.

This reading of this Court's cases is wrong and imposes a First Amendment based restriction on state-crafted defamation claims which is unjustified and unwarranted under *Hepps* or any of this Court's cases. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

There is no requirement in California law that a private figure plaintiff must prove constitutional malice if claiming punitive damages. Moreover, there is no state law requirement to prove malice at all to be entitled to general damages. Civil Code §48a allows for general damages for loss of reputation, shame, mortification and hurt feelings. Under California law, a private figure defamation plaintiff need not prove constitutional malice at all to obtain such

damages. *Brown v. Kelly Broadcasting Co.*, 48 Cal.3d 711, 257 Cal.Rptr. 708 (1989). The focus on mental state in the Court of Appeal's decision derives entirely from this Court's case law.

Thus, the Court of Appeal's federal constitutional error is solely responsible for its dismissal of Petitioner's otherwise valid state law defamation claims for general and other damages. Petitioner was entitled to prove defendants' intentional scheme, even in the absence of negligence allegations, without having to prove "constitutional malice with convincing clarity" (Pet. App. 9a) -- a requirement that the Court of Appeal erroneously believed it was required to impose on Petitioner based on this Court's decision in *Hepps*.

The Court of Appeal conflated the First Amendment requirement of showing constitutional malice with Petitioner's allegations that Respondents engaged in intentional misconduct. Such intentional misconduct, could be proved to satisfy the elements of a California defamation claim based upon a standard wholly unrelated to the constitutional malice requirement imposed by the First Amendment. By conflating and confusing these principles, the Court of Appeal's required Petitioner to shoulder a First Amendment burden beyond the requirements in this Court's cases properly construed.

This Court should take this opportunity to clear up the confusion caused by its decisions in private figure defamation cases against media defendants.

IV.
THIS COURT SHOULD NOT REVIEW THE ISSUE OF WHETHER PETITIONER IS A PUBLIC FIGURE

Respondents have not filed a timely cross-Petition for a Writ of Certiorari on the public figure issue. Nor have they given any compelling reason why that issue is appropriate for review in this Court. This Court should limit its review to the questions presented by Petitioner.

CONCLUSION

For all of these reasons, the Petition should be granted.

Respectfully submitted,

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